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SHIM VUI GEH v. DAYANG MASTURAH SAHARI & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
SUPANG LIAN JCA
B AZIMAH OMAR JCA
[CIVIL APPEAL NOS: S-01(NCvC)(W)-139-03-2022
& S-01(NCvC)(W)-140-03-2022]
17 OCTOBER 2023

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Abstract – *(i) Parties who have signed a document and more so if it is before a solicitor, cannot wriggle out of what they have signed unless it is a case of misrepresentation, undue influence or fraud proved. It would not generally be accepted if the parties assert that they do not know what they signed or that they did not read what they signed. Otherwise,* D *it would be very easy to disclaim liability merely by relying on what is essentially a plea of non est factum; (ii) Whilst there is no express prohibition against taking custody of the title to a property and having a sale and purchase agreement drawn up and the memorandum of transfer as security for a loan, all to be effected upon default, yet if such* E *a practice is permitted, it would defeat the purpose of the law. The safeguards afforded to the borrower, with many not having the power to negotiate the terms of the loan when in dire need of money, would be illusory when such a borrower has to sign the transfer of his land over to the lender in escrow.*

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MONEYLENDERS: *Loan – Loans of money – Borrower furnished properties as securities for loans – Whether loans were friendly loans – Whether loans were actually moneylending transactions – Whether loans null and void – Whether* G *borrowers can deny knowing or understanding what they had signed with respect to loans taken – Whether lender allowed to take 'security' for loans by way of outright transfer after borrowers defaulted in repayment of loans – Whether transfer of lands to lender and duly registered in his name liable to be set aside – Whether there was evidence of system, pattern, regularity or continuity of lender being involved in any moneylending transactions – Moneylenders Act 1951, ss. 10OA, 15* H *& 17A*

LAND LAW: *Title – Transfer – Borrower furnished properties as securities for loans – Whether lender could have custody of title to property and have sale and purchase agreement drawn up and memorandum of transfer as security for loans – Whether contrary to public policy – Whether transfer of titles to lender and registration in* I *lender's name defeasible – Whether registration ought to be set aside – Whether lands ought to be reverted to original proprietors – Moneylenders (Control and Licensing) Regulations 2003*

Two suits were heard together at the High Court. One was brought by Dayang Masturah ('Dayang') ('Dayang's suit') and the other by Mohd Harun ('Harun') ('Harun's suit'). Dayang was Harun's mother and Harun had asked her to help him to borrow from one Shim Vui Geh ('Shim'). Dayang had furnished her properties as a 'security' for the loans. Dayang and Harun had prayed for: (i) a declaration that the loans taken were null and void, being moneylending transactions; (ii) the relevant options to purchase, sale and purchase agreements and memoranda of transfers ('security documents') and the transfer of the three properties in Dayang's suit and one property in Harun's suit were null and void; and (iii) an order that the properties be transferred back to Dayang and Harun. Shim, on the other hand, counterclaimed for: (i) a declaration that he was the lawful and valid registered proprietor of the four properties; (ii) the arrears of rental on the four properties; and (iii) vacant possession of the four properties as well as damages for the tort of injurious falsehood and abuse of process. The High Court decided in favour of Dayang and Harun and held that: (i) the interest of 1.5% per month or 18% per annum sought to be charged after the repayment period was over, made the transactions an unlawful moneylending transaction and thus, the loans were null and void and unenforceable under ss. 15 and 17A of the Moneylenders Act 1951 ('MA'); and (ii) as for the properties transferred over, there was no right of set-off by applying the loan sums towards the agreed purchase price of the properties which various loan sums corresponded to the same amount as the purchase price. That being the case, there was no purchase price paid on the purported sale of the four properties and so, these properties shall be transferred back to Dayang and Harun. Shim's counterclaim was correspondingly dismissed. Aggrieved by the decision of the High Court, Shim filed the present appeals. The issues that arose before the court were: (i) whether the borrowers can deny knowing or understanding what they had signed with respect to the loans taken; (ii) whether the transactions were friendly loan transactions or illegal moneylending transactions; (iii) whether the lender was allowed to take a 'security' for the loans by way of an outright transfer after the borrowers have defaulted in the payment of the loans; (iv) whether the transfer of lands to the lender and the registration in his name was liable to be set aside; and (v) whether the counterclaim for the tort of injurious falsehood and the tort of abuse of process could be sustained.

Held (allowing appeal in part)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) The court believed the testimony of the lawyer who prepared the various documents for them to sign when she confirmed that both Dayang and Harun signed the documents in her presence in her legal firm and that she had explained in Bahasa Malaysia the contents of the documents to both of them and that they had understood the contents

before they signed the documents. Both Dayang and Harun could not deny that they were bound by what they signed. The question was whether the law would render what they had signed as evidencing an illegal moneylending transaction or that whether the 'security' taken was valid under the law. (paras 34 & 39)

(2) Shim and Harun were business partners and they were shareholders and directors in a company. They were clearly not total strangers who only met for the purpose of a loan. Shim had also known of Harun's father and uncle. Whilst Dayang might not have met or known Shim before the loan transactions, she was clearly introduced to Shim by Harun as Harun had only one piece of land for security of the loan and as he needed to further secure additional loans, he had asked his mother to help. Under the MA, any person who lends money at interest is presumed to be a moneylender and becomes an unlicensed moneylender if he does not have a licence under the MA, rendering the loans unenforceable and irrecoverable. Harun and Dayang had no evidence to offer on any allegations of a system, regularity, pattern or continuity where Shim's lending was concerned other than to themselves. Thus, the presumption under s. 10OA of the MA had been more than rebutted by Shim. The High Court Judge had erred in finding that the transactions were moneylending transactions when there was no evidence of a system, pattern, regularity or continuity of Shim being involved in any moneylending transactions. (paras 48, 50, 57 & 68)

(3) Regulation 10(1) of the Moneylenders (Control and Licensing) Regulations 2003 ('Regulations') provides that every agreement for moneylending transaction with security shall be in the form prescribed in Schedule K and makes it a criminal offence for non-compliance. Paragraph 4(a) of Schedule K further provides that where the security is an immovable property, the property shall be dealt with as provided for under O. 83 of the Rules of the High Court 1980 (which is now to be read as the Rules of Court 2012) with respect to charge actions. Regulations 10(2) of the Regulations further declared as void and of no effect and unenforceable any agreement for moneylending that is not in compliance with the prescribed form and in this case Schedule K and includes addition to the prescribed form. A sale and purchase agreement is not a proper moneylending agreement in compliance with Schedule K. A lender of a friendly loan cannot create for himself a form of security in an outright transfer of the land of the borrower put up as security when even licensed moneylenders and the banks cannot do that. It would be contrary to public policy to allow a mischief sought to be remedied by a statutory provision to be defeated on the basis of freedom of contract. (paras 100-102)

(4) The transfer of the four titles to Shim and the registration in his name were not defeasible as the agreements and the memoranda of transfers were void for the reasons given and thus, the registration had to be set aside and the four pieces of land were reverted to the original proprietors in Dayang and Harun. (para 106)

(5) Shim's counterclaim for the tort of injurious falsehood and the tort of abuse of process, said to have arisen as a result of Dayang and Harun making false statements, could not be sustained. (para 115)

(6) The appeal was allowed in part. Dayang and Harun shall each repay Shim the sum acknowledged to be owing to Shim. Judgment was allowed to be entered against: (i) Dayang for RM1,230,000 together with interest at 5% per annum from the date of this decision (on 17 March 2023) to date of realisation; and (ii) Harun for RM1,152,240 with interest at 5% per annum from the same date to the date of realisation. The default interest of 1.5% per month was struck down. Save for the above, the rest of the order of the High Court was affirmed and maintained. (paras 120-123)

Case(s) referred to:

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd [1996] 2 CLJ 561 FC ***(refd)***

Chai Then Song v. Malayan United Finance Bhd [1993] 2 CLJ 640 HC ***(refd)***

CIMB Bank Bhd v. Anthony Lawrence Bourke & Anor [2019] 2 CLJ 1 FC ***(refd)***

Citibank Canada v. Confederation Life Insurance Co (1996) CanLII 8269 ***(refd)***

Chow Yoong Hong v. Choong Fah Rubber Manufactory [1960] 1 LNS 17 PC ***(refd)***

Cubic Electronics Sdn Bhd (In Liquidation) v. Mars Telecommunications Sdn Bhd [2019] 2 CLJ 723 FC ***(refd)***

Esmail Sahib v. Noordin [1951] 1 LNS 19 ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Global Globe Property (Melawati) Sdn Bhd v. Jangka Prestasi Sdn Bhd [2020] 6 CLJ 1 CA ***(refd)***

John Lee & Son (Grantham) Ltd & Ors v. Railway Executive [1949] 2 All ER 581 ***(refd)***

Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd & Ors [1997] 3 CLJ 274 SC ***(refd)***

Leong Chooi Peng v. Tee Yam [2011] 1 LNS 1709 HC ***(refd)***

Litchfield v. Dreyfus [1906] KB 584 ***(refd)***

Sadhu Singh v. Sellathurai [1955] 1 LNS 137 HC ***(refd)***

Sia Hiong Tee & Ors v. Chong Su Kong & Ors [2015] 8 CLJ 1173 FC ***(refd)***

Subramaniam Dhanapakiam v. Ghaanthimathi [1991] 1 LNS 101 HC ***(refd)***

Suisse Atlantique Société D'armement Maritime SA v. NV Rotterdamsche Kolen Centrale [1966] 2 All ER 61 ***(refd)***

Tan Aik Teck v. Tang Soon Chye [2007] 5 CLJ 441 CA ***(refd)***

UMW Industries (1985) Sdn Bhd v. Kamaruddin Abdullah & Anor [1989] 2 CLJ 1278; [1989] 2 CLJ (Rep) 619 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 24(b)
Courts of Judicature Act 1964, s. 25(2)
Land Ordinance (Sabah) (Cap 68), ss. 88, 104
Moneylenders (Amendment) Act 2011, s. 10OA
Moneylenders Act 1951, ss. 2, 3, 15, 17A, 10L, 10M(1), (2), (3), 10N(6), 10O(2), 10OA, 10OB, 10OC
Moneylenders (Control and Licensing) Regulations 2003, reg. 10(1), (2)
Land Rules (Sabah) (GN 505/1930), r. 14(1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19), (20)
Rules of the High Court 1980, O. 83

For the appellant - Tsang Hieng Yee; M/s Tsang & Co
For the respondent - Sharatha Masyaroh John Ridwan Lincon; M/s Lincon & Co

[Editor's note: For the High Court judgment, please see Mohd Harun Indra Pg Elias v. Shim Vui Geh & Ors And Another Case [2022] 7 CLJ 74 (overruled in part).]

Reported by Lina E

JUDGMENT

Lee Swee Seng JCA:

[1] A friend in need is a friend indeed and a wise teacher once said "Give to the one who asks you and do not turn away from the one who wants to borrow from you." Yet money has, on many an occasion, soured and spoilt friendship as can be seen here in the parties suing each other over the true nature of money lent, the sum of which is not disputed in the statement of agreed facts ("SAFs").

[2] This judgment shall explore whether a lender may charge reasonable interest upon default to repay by the borrower in a friendly loan or would the imposition of interest of any amount upon default make the loan an illegal moneylending transaction. It shall also delve into the interplay of the presumption of moneylending even though there is only a single transaction of a loan at interest and the proof of the business of moneylending by a moneylender.

[3] There is also the related issue of whether a lender may take as "security" for a loan an option to purchase the lands put up as security for the loan together with a sale and purchase agreement and a memorandum of transfer duly signed when the loan was acknowledged to have been taken and upon a default in payment, to then effect the transfer over from the borrower to the lender. What then is the effect of such a transfer even if the loan is a friendly loan?

At The High Court

[4] There were two suits heard together in the High Court below. One was brought by Dayang Mastura bt Sahari ("Dayang") in Suit SDK-22NCvC-1-1-2020 (HC) ("Dayang's suit") and the other by Mohd Harun Indra bin Pg Elias ("Harun") in Suit SDK-22NCvC-26-12-2019 (HC) ("Harun's suit"); both in the High Court in Sabah and Sarawak at Sandakan.

[5] Dayang is Harun's mother and it is not disputed that Harun had asked his mother to help him to borrow from one Shim Vui Geh ("Shim"), the first defendant in both the suits. Hence, Dayang had furnished her properties as "security" for the loans.

[6] The principal defendant is Shim and we should also state at this juncture in passing that, there were the Registrar of Land Titles of Sabah and the Director of Lands and Survey Department Sabah named as the second and third defendants respectively in the High Court below for both the suits. They took no part in the proceedings and were named only as nominal defendants for the purpose of effecting a transfer back of the four pieces of land back from Shim to Dayang and Harun.

[7] The plaintiff, in both suits heard together, had prayed for a declaration that the loans taken as evidenced in the three acknowledgments of indebtedness and undertaking to pay in Dayang's suit and one in Harun's suit are null and void, being an illegal moneylending transaction.

[8] There was also the consequential prayers that the relevant options to purchase, sale and purchase agreements and memoranda of transfer and indeed the transfer of three properties in Dayang's suit and one in Harun's suit are null and void and an order that the properties in the lands be transferred back to the respective plaintiffs.

[9] The defendant on the other hand had counterclaimed for a declaration that he is the lawful and valid registered proprietor of the four properties and for the arrears of rental on the four properties and vacant possession of the same as well as damages for the tort of injurious falsehood and abuse of process.

[10] The High Court found for both the plaintiffs after having concluded from the evidence adduced that the interest of 1.5% per month or 18% per annum sought to be charged after the repayment period was over, made the transactions an unlawful moneylending transaction and thus the loans are null and void and unenforceable under s. 15 and s. 17A of the Moneylenders Act 1951 ("MA 1951"). As for the properties transferred over, there was no right of set-off by applying the loan sums towards the agreed purchase price of the properties which various loan sums corresponded to the same amount as the purchase price. That being the case, there was no purchase price paid on the purported sale of the four properties and so these landed properties shall be transferred back to the respective plaintiffs and registered proprietors of the lands.

[11] The defendant's counterclaim was correspondingly dismissed. Aggrieved by the decision of the High Court, the defendant had appealed to the Court of Appeal.

Before The Court Of Appeal

[12] Before us, the plaintiff argued that the moneylending is a friendly loan as not only were the plaintiff Harun and the defendant Shim, business partners in a company called Borneo Mulia Sdn Bhd, both being shareholders and directors, but that Shim had also known Harun's father and an uncle of Harun and they have some birds' nest business together.

[13] Harun and Shim were not strangers but instead, have done business together for years and so when Harun wanted a loan, Shim as a friend felt obliged to help with no element of interest charged for the repayment period of some six months from July to December 2017 and interest would only be chargeable at the rate of 1.5% per month on the amount outstanding thereafter.

[14] Even then, the interest was not imposed at all and the transfer of the four pieces of land, three belonging to Harun's mother, Dayang and one belonging to Harun, were all done for expediency with the agreed purchase price being the same as the various loan amounts.

[15] Shim contended that both Harun and Dayang knew about this because some rentals were paid on the lands after the registration into Shim's name, and it was only when Shim asked for vacant possession after default in rental payments that Dayang and Harun filed their respective suits to declare the moneylending transactions as an illegal one and to obtain a declaration that the transfer of the lands to Shim were illegal, null and void and for the lands to be transferred back to Dayang and Harun respectively.

[16] Shim argued that there was no evidence of a system of moneylending to others or a pattern of continuity in such a moneylending transaction and that he had only lent to a friend and business partner in need. As such, any presumption of illegal moneylending had been rebutted and though interest was agreed at 1.5% per month upon default in repayment after 31 December 2016, yet none was imposed on the lands transferred to Shim in repayments of the loans.

[17] It is not disputed that Harun had wanted more loans and so he had convinced his mother Dayang to help by "securing" her three pieces of land to Shim for three loans amounting to RM1.23 million after the initial loan of RM1,152,240 "secured" over Harun's land.

[18] Both Harun and Dayang argued that the presumption of moneylending had not been rebutted and that even a single transaction may amount to moneylending such that as Shim does not have a licence for moneylending, the transaction is illegal, null and void and unenforceable.

[19] They also argued through their counsel that the learned High Court Judge had not erred in ordering the transfer of the four pieces of land back to them as there was no right of set-off under the law and as the purchase price had not been paid, the transfer ought to have been set aside as was so ordered by the High Court with the consequential order of a transfer back of those four pieces of land to Dayang and Harun.

[20] The parties shall be referred to as Shim, Dayang and Harun; Shim being the principal defendant/appellant and Dayang being the plaintiff in the Dayang's suit and Harun the plaintiff in the Harun's suit, both being heard together in the High Court below.

[21] Before us too, both appeals of Shim from the decision of the High Court in Dayang's suit and Harun's suit were also heard together.

Whether The Borrowers Can Deny Knowing Or Understanding What They Had Signed With Respect To The Loans Taken

[22] There is nothing wrong in lending to someone in need especially when the borrower is known to you as a friend. It has often been said that what is prohibited by the MA 1951 is not moneylending but the business of moneylending without a licence. As to whether a lender is in the business of moneylending, that is a question of fact which determination would turn on the evidence of a system, regularity, continuity or pattern in the lending activity.

[23] Thus, it was said in the context of the English statute on moneylending in *Litchfield v. Dreyfus* [1906] KB 584 by Farwell J said (at p. 590) as follows:

> … it would be a straining of the language of the Act to hold that a man who so obliges friends is carrying on the business of a moneylender. The Act was intended to apply only to persons who are really carrying on the business of moneylending as a business, not to persons who lend money as an incident of another business or to a few old friends by way of friendship. The particular Act was supposed to be required to save the foolish from the extortion of a certain class of the community who are called moneylenders as an offensive term. Moneylending is a perfectly respectable form of business. Nobody says that bankers are rascals because they lend money.

[24] In the SAFs for Dayang's suit in encl. 17, the amount of the loans corresponding to the dates the loans were taken or accepted as having been taken were admitted in paras. 1 to 3 thereof. The following was clearly and unequivocally admitted as the acknowledgments of loans in three deeds of acknowledgment indebtedness and undertaking to pay dated 26 July 2016 for the sum of RM480,000 ("first deed"); dated 26 July 2016 for the sum of RM500,000 ("the second deed") and dated 9 November 2016 for the sum of RM250,000 ("the third deed"). She acknowledged being indebted to the defendant in the respective sum.

[25] The relevant paras. 1 to 3 of the SAFs are reproduced below:

> 1. Pursuant to a Deed of Acknowledgment of Indebtedness and Undertaking to Pay dated 26th July 2016 (hereinafter referred to as "the said 1st Deed"), the Plaintiff acknowledged that the Plaintiff indebtedness to the 1st Defendant in a sum of Ringgit Malaysia four hundred and eighty thousand (RM480,000.00) upon the terms and conditions in the said 1st Deed.
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> 2. Pursuant to a Deed of Acknowledgment of Indebtedness and Undertaking to Pay dated 26th July 2016 (hereinafter referred to as "the said 2nd Deed"), the Plaintiff acknowledged that the Plaintiff indebtedness to the 1st Defendant in a sum of Ringgit Malaysia five hundred thousand (RM500,000.00) upon the terms and conditions in the said 2nd Deed.
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> 3. Pursuant to Deed of Acknowledgment of Indebtedness and Undertaking to Pay dated 09th November 2016 (hereinafter referred to as "the said 3rd Deed"), the Plaintiff had acknowledged that the Plaintiff indebtedness to the 1st Defendant in a sum of Ringgit Malaysia two hundred and fifty thousand (RM250,000.00) upon the terms and conditions in the said 3rd Deed.
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> 4. Among the terms and conditions of the said 1st, 2nd and 3rd Deed were as follows:
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> (i) The Plaintiff undertake and agree to repay the sum indebtedness on or before 31st December 2016 or upon demand by the 1st Defendant in writing whichever is earlier,
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> And
>
> (ii) In the event that the Plaintiff defaults, fail or neglect to repay the said sum indebtedness or any part thereof then the 1st Defendant shall be entitled to take legal action against the Plaintiff to recover the sum indebtedness.

[26] Whilst she had contended that these deeds were signed by her without her understanding what they were as she did not understand English, we do not think in the circumstances of this case, she can say that she is not bound by what she had signed; and more so in the fact that her solicitors had agreed to in the SAFs being filed with the High Court below. Whereas in this case, she could have asked the lawyer in the legal firm that she went to sign the three deeds, the nature of the documents she was signing, even if she had not asked but was prepared to sign nevertheless, she is still bound by what she had signed.

[27] It is not every day that she would have gone to a solicitors' office to sign documents and even to part with her three titles to her properties. Surely, if it had been explained to her, as she said by a lawyer in the law office that the documents she signed was to secure a loan taken on behalf of her son, Mohd Harun Indra bin Pg Elias, she would have asked how much the loan is for.

[28] Whilst she may not have physically received the loans from Shim for the loans were meant for her son Harun, we cannot now go behind the SAFs in the High Court where she had unreservedly admitted that the loans of RM1.23m were taken in total as evidenced in the three deeds.

[29] In Harun's case, it was a loan of RM1,152,240 as evidenced in a deed of acknowledgment and undertaking to repay dated 26 July 2016 which he agreed to repay Shim on or before 31 December 2016 or upon demand by Shim, whichever is earlier. The SAFs appear in encl. 16 in Harun's suit as follows:

> 1. Pursuant to a Deed of Acknowledgment of Indebtedness and Undertaking to Pay dated 26th July 2016, the Plaintiff acknowledged that the Plaintiff indebtedness to the 1st Defendant in a sum of Ringgit Malaysia RM1,152,240.00 upon the terms and conditions in the said Deed.
>
> 2. Among the terms and conditions of the said Deed were as follows:
>
> (i) The Plaintiff undertake and agree to repay the sum indebtedness on or before 31st December 2016 or upon demand by the 1st Defendant in writing whichever is earlier; and
>
> (ii) In the event that the Plaintiff defaults, fail or neglect to repay the said sum indebtedness or any part thereof then the 1st Defendant shall be entitled to take legal action against the Plaintiff to recover the sum indebtedness.

[30] The period for repayment of the loan was also stated to be on or before 31 December 2016 or upon demand in writing, whichever is earlier. It is not disputed that Shim did not make an earlier demand on the four loan sums. There is no interest element for the agreed period of repayment. Interest was stated as would be charged at the rate of 1.5% per month upon default.

[31] Harun had also testified that he did not receive the said sum but in the light of the SAFs, we do not think he is permitted to resile from what he had agreed to. His mother Dayang and him had signed the payment vouchers for their respective loans of RM480,000, RM500,000, RM250,000 with respect to Dayang and RM1,152,240 with respect to Harun. It is not their pleaded case that transactions and documents supporting them were a sham.

[32] Again, Harun also tried to convince the High Court that more than signing the documents blank including payment vouchers indicating amounts duly received by him and Dayang, he did not know what he had signed but that could hardly be believed from someone like him who had studied in Australia and have some businesses with Shim in the planting of oil palm on his land in a joint venture with Shim. Even if he is not sure as to the ramifications of what he had signed, surely, he could easily have asked the solicitor attending to him, PW3, in the legal firm instructed by Shim to prepare the necessary documents to protect Shim's interest.

[33] Parties who have signed a document and more so if it is before a solicitor, cannot wriggle out of what they have signed unless it is a case of misrepresentation, undue influence or fraud proved. It would not generally be accepted if the parties assert that they do not know what they signed or that they did not read what they signed. Otherwise, it would be very easy to disclaim liability merely by relying on what is essentially a plea of *non est factum.*

[34] Both Dayang and Harun had subpoenaed as their witness PW3 Teressa binti Sirri, the lawyer from Messrs Chin Lau Wong & Foo, the solicitors who prepared the various documents for them to sign. We can believe her testimony when she confirmed that both Dayang and Harun signed the documents in her presence in her legal firm and that she had explained in Bahasa Malaysia the contents of the documents to both of them and that they had understood the contents before they signed the documents.

[35] Her evidence was not challenged as it was in Shim's favour and her evidence as a witness for the plaintiffs, Dayang and Harun, had become the plaintiffs' evidence. There is no good reason for us to disbelieve PW3, an advocate and solicitor of the High Court of Sabah and Sarawak.

[36] In *Chai Then Song v. Malayan United Finance Bhd* [1993] 2 CLJ 640, the appellant contended that he signed the deed of guarantee with relevant particulars left blank which were subsequently filled in. The appellant disputed the validity of the deed of guarantee on the grounds that the fundamental elements of the formation of a contract have not been fulfilled.

[37] The High Court held at p. 643 that:

> A person who chose to be careless, or not bothered to find out the contents, or not bothered to find out the contents therein, or relied completely upon others to complete the same, is responsible for his own actions and, he is prevented from denying the contents therein do not bind him.

[38] Likewise, in *UMW Industries (1985) Sdn Bhd v. Kamaruddin Abdullah & Anor* [1989] 2 CLJ 1278; [1989] 2 CLJ (Rep) 619 it was observed as follows:

> … As for the 2nd defendant's intention that he only signed blank guarantee forms, he has only himself to blame as the plea of *non est factum* does not work in favour of a person who has shown himself to be negligent.

[39] We find that both Dayang and Harun cannot deny that they are bound by what they signed. The question is whether the law would render what they had signed as evidencing an illegal moneylending transaction or that whether the "security" taken is valid under the law.

Whether The Transactions Are Friendly Loan Transactions Or Illegal Moneylending Transactions

[40] A "moneylender" is defined under the MA 1951 in s. 2 thereof as follows:

> 'moneylender' means any person who **carries on** or advertises or announces himself or holds himself out in any way **as carrying on the business of moneylending,** whether or not he carries on any other business. (emphasis added)

[41] "Moneylending" is defined in s. 2 of the MA 1951 as:

> 'moneylending' means the **lending of money at interest,** with or without security, by a moneylender to a borrower. (emphasis added)

[42] Generally, a single money lending transaction cannot make one a moneylender. In *Chow Yoong Hong v. Choong Fah Rubber Manufactory* [1960] 1 LNS 17; [1962] MLJ 74, the Privy Council adopted the statement of Thomson J (as he then was) in *Sadhu Singh v. Sellathurai* [1955] 1 LNS 137; [1955] MLJ 117 on the interpretation of a moneylender:

> The Court of Appeal likewise dealt only with this question; and in dealing with it concerned themselves very closely with the true meaning and effect of section 3 of the Ordinance. This section is not in their Lordships' opinion in the circumstances of this case of great significance, but in view of the different approach by the Judges in the Federation of Malaysia, they think it desirable to make some comment on it.
>
> Section 3 provides that 'any person who lends a sum of money in consideration of a larger sum repaid shall be presumed until the contrary be proved to be a moneylender'. The effect of this section has been considered by Thomson J (as he then was) in *Sadhu Singh v. Sellathurai* [1955] MLJ 117 in a judgment which their Lordships respectfully approve and adopt. *To lend money is not the same thing as to carry on the business of moneylending. In order to prove that a man is a moneylender within the meaning of the Ordinance, it is necessary to show some degree of system and continuity in his moneylending transactions.* If he were left to discharge this burden without the aid of any presumption, a defendant might frequently be in a difficulty. He might have had only one or two transactions with the moneylender and he might find it difficult to obtain evidence about the business done by the moneylender with other parties. Section 3 enables a defendant to found his claim on proof of a single loan made to him at interest, it being presumed, in the absence of rebutting evidence, that there were sufficient other transactions of a similar sort to amount to carrying on of business. (emphasis added)

[43] Section 3 of the MA 1951 was deleted by the Moneylenders (Amendment) Act 2003 [Act A1193] ("MAA 2003") and so now there is a total absence of that section that used to read as follows:

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3. Certain persons and firms presumed to be moneylender

Save as excepted in section 2A(1) and (2), any person **who lends a sum of money in consideration of a larger sum being repaid** shall be presumed until the contrary be proved to be a moneylender. (emphasis added)

B **[44]** Whilst the above was deleted there was a further addition of s. 10OA introduced by the Moneylenders (Amendment) Act 2011 [Act A1390] ("MAA 2011") that reads:

Where in **any proceedings** against any person, it is alleged that such person is a moneylender, **the proof of a single loan at interest made by such person shall raise a presumption** that such person is carrying on the **business of moneylending,** until the contrary is proved. (emphasis added)

C

[45] In *Leong Chooi Peng v. Tee Yam* [2011] 1 LNS 1709 at p. 41, it was said of the above s. 10OA as follows:

Being a rebuttable presumption, those cases that deal with the meaning of "the business of moneylending" as referred to in *Muhibbah Teguh*'s case (*supra*) might well prove relevant again in the future in resolving a once-off friendly loan transaction with interest.

D

[46] The current definition of "moneylender" was brought about by the MAA 2011 which came into force on 15 April 2011 *vide* P.U.(B) 174/2011.

E **[47]** This is to be contrasted with the old definition of "moneylender" introduced by the MAA 2003 which came into force on 1 November 2003. "Moneylender" was defined as meaning:

any person who lends a sum of money to a borrower in consideration of a larger sum being repaid to him.

F

[48] What is clear here is that Shim and Harun are business partners in an oil palm business and they are shareholders and directors in the company incorporated for the purpose of the cultivation and harvesting of oil palm on Harun's land. They are clearly not total strangers who only met for the purpose of a loan. Shim had also known Harun's father and an uncle of Harun and they have some birds' nest business together.

G

[49] In Harun's own words in his witness statement as PW1, he had admitted as follows:

9. Q: What is your relation with Shim Vui Geh?

H

A: He is my friend and before today's matter, in year 2005 we had entered into the Joint Venture Agreement to cultivate and develop my land as above under the name of Borneo Mulia Sdn Bhd and I am one of the directors and shareholder of the company. I had resigned as director in year 2016. So we know each other for almost 11 years.

I

[50] Whilst Harun's mother, Dayang (PW2), might not have met or known Shim before the loan transactions, she was clearly introduced by her son Harun as Harun had only one piece of land for security of the loan and as he needed to further secure additional loans, he had asked his mother to help. Shim's evidence was that he had met Dayang on those times when he went over to visit Harun during Hari Raya. In Dayang's own words in her witness statement, she had stated as a matter of fact as follows:

> 12. Q: Are you saying that you never had dealings with Shim Vui Geh at all?
>
> A: Sometime in 2016, my son had approached me and asked my favour to contribute capital because he wanted to run a business, I informed my son that I had no money but if my son insisted to run the business, he may lend (*sic*) money from anyone and used my properties as security.

[51] The observation of the Court of Appeal in *Tan Aik Teck v. Tang Soon Chye* [2007] 5 CLJ 441 at pp. 451 to 452 would be relevant here as follows:

> ... The defendant contended that from the evidence of the plaintiff himself, the plaintiff met the defendant about two or three times before the loan was given and as such it could not be a friendly loan. ... A friendly loan is opposed to the normal borrowing from a moneylender or financial institution. *A friendly loan is a loan between two persons based on trust. There may be an agreement such as an I.O.U. or security pledged to repayment but most important there will be no interest imposed.*
>
> ... In my view, a friendly loan is a loan given by the lender to the borrower based on mutual trust whereby the borrower was to repay the loan amount within the specified time with no interests charged ...
>
> (emphasis added)

[52] From the SAFs, no interest was charged during the period of the loan. However, interest at the rate of 1.5% per month was chargeable after 31 December 2016 after the period of repayment of the loan. Shim argued that though it was stated as such, he did not, in reality, charge any interest even after Dayang's and Harun's default. However, there is a catch there as there was nothing stated as to the market value of the four pieces of land taken as security for the loans which had been transferred to Shim after the default. More shall be said about that in our discussion on whether the security for the loans could be by way of outright transfer documents signed in escrow.

[53] We appreciate that in a case of friendly loan, the lender should not be made to suffer greater loss in trying to help a friend or someone in need and to face the uncertainty of not being able to recover the loan and the risk of non-recovery and yet not being able to charge the costs of funds which the lender would have to bear or conversely put the money to use profitably or

even by earning interest by putting it in fixed deposit with a bank. In trying to help someone in need, the law does not require one to be so selfless and sacrificial as not to be able to charge a reasonable amount of interest upon default to cover the lender's loss or the foregoing of his gain.

[54] In *Subramaniam Dhanapakiam v. Ghaanthimathi* [1991] 1 LNS 101; [1991] 2 MLJ 447, where interest upon default was volunteered by the borrower and paid from time to time, the Singapore High Court had no problem in allowing judgment to be entered even upon a summary judgment application as follows:

> In the present case, the defence was no defence. The loans were friendly loans between two long-time friends. **Interest was not demanded but accepted when offered. The interest was not exorbitant and varied in accordance with the generosity of the defendant.** The plaintiff did not lend to all and sundry. On these facts, there was no question of the plaintiff being a moneylender as defined in the Act. If there had been a trial, the result would have been the same. (emphasis added)

[55] Long time ago before most of us were born, Spenser-Wilkinson J in *Esmail Sahib v. Noordin* [1951] 1 LNS 19; [1951] MLJ 98, observed though in the context of the difference between the English Act and the then Singapore Ordinance with respect to Moneylending as follows:

> There is however one important difference between the English law on this subject and the local law. Section 3 of the Moneylenders Ordinance reads as follows:
>
> > 3. Save as excepted in paragraphs (a), (b), (c), (d) and (f) of the definition of 'Moneylender' in section 2, any person who lends money at interest or who lends a sum of money in consideration of a larger sum being repaid shall be presumed, until the contrary be proved, to be a moneylender. Counsel were unable to cite any local authority which could assist me in determining the effect of this section and I have been in some doubt as to the extent of the burden of proof cast by this section upon a plaintiff who has in fact lent money at interest. *It is difficult to see how else a plaintiff can discharge this burden except by himself giving evidence to the effect that he is not a moneylender and by submitting to cross-examination on the point.* (emphasis added)

[56] Whilst there is no longer the presence of a s. 3 presumption, yet there is a new s. 10OA which is a rebuttable presumption that the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying on the business of moneylending. Assuming that interest would cover interest upon default, Shim was unshaken in, cross-examination with respect to any allegation that he had lent to others at interest. Under the MA 1951, any person who lends money at interest is presumed to be a moneylender and becomes an unlicensed moneylender if he does not have a licence under the MA 1951, rendering the loans unenforceable and irrecoverable.

[57] Harun and Dayang had no evidence to offer on any allegations of a system, regularity, pattern or continuity where Shim's lending is concerned other than to themselves. Thus, the presumption under s. 10OA had been more than rebutted by Shim.

[58] We further state that the interest here is interest charged for the duration of the loan and that upon default, the court may allow a reasonable interest to cover the costs of the funds for the lender and in any event not exceeding the 5% per annum interest that the court may award on a monetary claim.

[59] The power of the High Court to grant interest on a debt claimed is found in s. 25(2) of the Courts of Judicature Act 1964 [Act 91] ("CJA") and para. 7 of the Schedule to the Act. Section 25(2) of CJA states:

> Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule: Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

[60] Paragraph 7 of the Schedule to the CJA then confers upon the Courts as follows:

> **Power to direct interest to be paid on debts** including judgment debts, or on sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the Court. (emphasis added)

[61] The High Court is also vested with the power and discretion to strike down the interest charged upon default that exceeds the statutory limit of 8% per annum for secured loan or 12% per annum for unsecured loan or not to grant any interest at all if the conduct of the lender has the element of taking advantage of the borrower in distress and high-handed at that.

[62] We appreciate that there is an argument that s. 10OA of the MA 1951 applies only to criminal proceedings and not civil proceedings as it is parked under Part IV under evidence and that the sections within it deal with for example s. 10L on evidence of accomplice and agent provocateur, s. 10M with protection of informers and information, s. 10N with admissibility of statements by accused persons, s. 10O on provisions as to evidence and s. 10OA on presumption as to the business of moneylending. Then, there are s. 10OB on evidence and records of previous conviction and s. 10OC on diary of proceedings in investigation.

[63] We are not so persuaded as the legislators have used in some instances "criminal proceedings" as opposed to "any proceedings". In s. 10L, s. 10N(6) and (7), reference is made to "criminal proceedings" in contradistinction to s. 10M(3), s. 10O(2) and s. 10OA where the expression "any proceedings" is used.

[64] Moreover on the earlier sections in s. 10M(1) and (2) reference is made to "any civil or criminal proceedings", thus allowing us to conclude that the legislator was very conscious of the fact of the distinction that makes a difference.

[65] Furthermore, the reference to "any proceedings" in s. 10M(3) is with respect to "any proceedings relating to any offence under this Act" and in s. 10O(2), it is "in any proceedings for an offence under this Act." When it comes to s. 10OA, there is a shift in the language used to that of "in any proceedings against any person." As we are aware, in the proceedings in the High Court below, both Dayang and Harun have a claim against Shim. Their claims would come within the meaning of "any proceedings against any person." They thus qualify to use the presumption that Shim was carrying on the business of moneylending. Be that as it may, Shim had more than rebutted the presumption when his evidence that he had not lent to others had not been challenged.

[66] The relevant sections of the MA 1951 are set out below for ease of reference:

> **10M. Protection of informers and information**
>
> (1) Except as hereinafter provided, no complaint as to an offence under this Act shall be admitted in evidence in **any civil or criminal proceedings,** and no witness shall be obliged or permitted to disclose the name or address of any person who gave the information, or the substance and nature of the information received from him, or state any matter which might lead to his discovery.
>
> (2) If any application, particular, return, account, document or written statement which is given in evidence or liable to inspection in **any civil or criminal proceedings** contains any entry in which any person who gave the information is named or described, or which might lead to his discovery, the court before which the proceedings are held shall cause all such entries to be concealed from view or to be obliterated so far as may be necessary to protect such person from discovery, but no further.
>
> (3) If in **any proceedings relating to any offence** under this Act, the court, after full inquiry into the case, is of the opinion that the person who gave the information wilfully made in his complaint a material statement which he knew or believed to be false or did not believe to be true, or is of the opinion that justice cannot be fully done between the parties to the proceedings without the discovery of the person who gave the information, the court may require the production of the original complaint, if in writing, and permit inquiry and require full disclosure concerning that person.

10N Admissibility of statements by accused persons

(6) Where in **any criminal proceedings against a person for an offence under this Act,** evidence is given that the accused, on being informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time he could reasonably have been expected to mention when so informed, the court, in determining whether the prosecution has made out a *prima facie* case against the accused and in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper; and the failure may, on the basis of those inferences, be treated as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure is material.

(7) Nothing in subsection (6) shall in **any criminal proceedings**:

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of any thing said in his presence relating to the offence in respect of which he is charged, in so far as evidence thereof would be admissible apart from that subsection; or

(b) be taken to preclude the drawing of any inference from any silence or other reaction of the accused which could be drawn from that subsection.

10O Provisions as to evidence

(2) When in **any proceedings for an offence under this Act** it is necessary to prove that a person was, or was not, the licensee, a certificate purporting to be signed by the Registrar and certifying that the person was or was not, the licensee, shall be admissible as evidence and shall constitute *prima facie* proof of the facts certified in such certificate, without proof of the signature or the authority of the Registrar to issue the certificate.

10OA Presumption as to the business of moneylending

Where in **any proceedings against any person**, it is alleged that such person is a moneylender, the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying on the business of moneylending, until the contrary is proved. (emphasis added)

[67] On the facts of this case, we find that with or without the aid of the rebuttable presumption under s. 10OA of the MA 1951, Shim had given evidence that he is not in the business of moneylending, with the corresponding characteristic element of a system, regularity, pattern or continuity of lending at interest and Dayang and Harun had not been able to adduce any evidence to contradict that. He had also given evidence of all the businesses he is involved in as a businessman and the licenses for the various businesses including trading, logging, construction, cement, transportation, fertiliser, cleaning business, hardware and plantation.

[68] With respect, the learned High Court Judge had erred in finding that the transactions were moneylending transactions when there was no evidence of a system, pattern, regularity or continuity of Shim being involved in any moneylending transactions. We are constrained therefore, to disturb this finding of fact of the learned trial Judge in the High Court, guided as we are by the *dicta* of Steve Shim (CJ (Sabah & Sarawak)) in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 FC on appellate intervention:

> The Court of Appeal had clearly borne in mind the central feature of appellate intervention *ie*, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of the evaluation of the evidence by the trial court. Clearly, the phrase "insufficient judicial appreciation of evidence" merely related to such a process.

Whether The Lender Is Allowed To Take A "Security" For The Loans By Way Of An Outright Transfer After The Borrowers Have Defaulted In Payment Of The Loans

[69] At the same time as the deed of acknowledgment and undertaking to repay was signed, the borrowers Dayang and Harun were also asked to sign an option to purchase, a sale and purchase agreement and a memorandum of transfer form under the Sabah Land Ordinance together with the land titles to the respective properties (collectively referred to as the "security documents") being deposited with Shim's solicitors.

[70] The "security documents" for Harun's land with respect to Harun's suit relate to a piece of land measuring 58.29 hectares situated at Kg. Suan Lamba, Sandakan held under CL 075536220.

[71] As for the "security documents" for Dayang's lands with respect to Dayang's suit are as follows:

> (i) One (1) unit of double storey semi-detached house known as Lot No. 188, Astana Heights, Phase 2A situated at Jalan Lalang, Off Mile 1 y2, North Road Sandakan held under Master Title No. CL 075145103 ("Lot 188");
>
> (ii) One (1) unit of double storey semi-detached house known as Lot No. 189, Astana Heights, Phase 2A situated at Jalan Lalang, Off Mile 1 y2, North Road Sandakan held under Master Title No. CL 075145103 ("Lot 189") and
>
> (iii) One (1) unit of double storey detached house situated at Mile 1.5, Jalan Utara, Jalan Bunga Botan, Sandakan held under TL 077515443 ("detached house").

[72] Shim's lawyer, one Miss Teresa binti Siri (PW3) of Messrs Chin Lau Wong & Foo, who prepared the "security documents", explained to them that they were the security documents for the loans in the event that the loans

could not be repaid on time by 31 December 2016. The lawyer PW3 was a lawyer of Shim's choice and both Harun and his mother Dayang were not separately represented.

[73] In giving evidence for the plaintiffs Dayang and Harun, PW3 said under the cross-examination in answer to questions 278 and 279 in the notes of proceedings as follows:

> Q 278:
>
> Did they acknowledge to you that they understood and agreed to the contents of the documents?
>
> A:
>
> Yes. They understood and agreed to the contents of the documents before they signed. And I remember for this particular Mohd Harun bin Pg Elias after I explained when I said "kalau kamu gagal bayar duit ini, dalam tempoh yang dinyatakan disini iaitu Deed of Indebtedness and Undertaking to pay, Shim Vui Geh akan melaksanakan hak dia di dalam Sale and Purchase agreement berkaitan dengan tanah kamu iaitu dalam mukasurat 65 Bundle B and after that he said to me "itu kalau, kan puan?" those are his exact words, I remember exactly.
>
> Q 279:
>
> Did you also explain the same "kalau kamu gagal bayar duit ini, dalam tempoh yang dinyatakan di sini iaitu Deed of Indebtedness and Undertaking to pay, Shim Vui Geh akan melaksanakan hak dia di dalam Sale and Purchase agreement ..." to Puan Dayang as well?
>
> A:
>
> Yes, I also explained the same.

[74] Clearly from her explanation which we have no reason to disbelieve, the documents signed were used as "security documents" to effect a transfer upon default by Dayang and Harun after 31 December 2016. Thus, the payment vouchers were even written as "being full payment of the said purchase price." Both Dayang and Harun would have to trust the solicitor as PW3 confirmed that all the documents including the sale and purchase agreements, the memoranda of transfer and payment vouchers were kept in her solicitors' office.

[75] PW3 Teressa further explained under the cross-examination as follows in answer to Question 281:

> Q 281:
> Can you explain why all these documents were kept in your firm?
>
> A:
> Because these documents were only be enforced if there is a default on the part of Encik Mohd Harun bin Pg Elias and Puan Dayang in payment of the sum due to Shim Vui Geh.

A Q 281:
Do you agree with me that those documents were only to be dated if and when Encik Harun and Puan Dayang failed to cancel the sale of the properties by end of December 2016 and Mr Shim exercised the option to purchase?

B A:
Yes, agree.

[76] When the loans could not be repaid, the respective options to purchase were exercised, the sale and purchase agreements were dated together with their corresponding memoranda of transfer to effect the registration of the C properties to Shim.

[77] Whilst most of the deeds of acknowledgment and undertaking to repay were in July 2016 with one dated 9 November 2016 with respect to the loan of RM250,000 by Dayang, the period for repayment of the loans without interest was by 31 December 2016. The security documents employed being D not a registered charge, the borrowers would have to trust Shim to honour his word that the properties would not be transferred to Shim until after 31 December 2016. We note that in the deeds of acknowledgment and undertaking to repay, Shim would be at liberty to demand for an earlier repayment which in any event, did not happen in the two appeals before us.

E **[78]** We note that there was no expiry date for the options to purchase given to Shim such that Shim can exercise what is made to look like an option to purchase at any time. Both Dayang and Harun would have to trust Shim that he would not exercise the options to purchase earlier than 31 December 2016.

F **[79]** Under the Sabah Land Ordinance (Cap 68) ("SLO"), security over land is created by way of a charge. The instrument of charge is in the memorandum of charge in Schedule XV (s. 104) of the SLO. It is stated in the memorandum of charge as follows:

G In consideration of the principal sum of ringgit lent to me/us by (hereinafter called "the chargee(s)"), the receipt of which sum I/we hereby acknowledge, do hereby, bind myself/ourselves to pay to the chargee(s) on the day of every month/year commencing on the day of, 19, the said sum and interest thereon at the rate of per cent per annum by equal payments of ringgit being the total amount of the principal sum and H interest then due.

In default of payment of the interest or of any part thereof, or of the principal sum hereby secured, it shall be lawful for the said chargee(s), after the expiration of one month's notice served upon me/us by the chargee(s) or his/their agent as serving officer, to obtain an order from the Collector for the sale of the said land in accordance I *with the provisions of the Land Ordinance.* (emphasis added)

[80] A security for a loan taken cannot be allowed to be created by way of an outright transfer in the form of an "option to purchase", a "sale and purchase agreement" signed and a "memorandum of transfer" in Schedule XIII form to the SLO signed in escrow.

[81] Just as in the case of the National Land Code ("NLC") in West Malaysia, the provisions of the SLO are exclusive and exhaustive with respect to the remedies available with the necessary safeguards for a borrower being built into the statutory provisions and protection. See: *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd & Ors* [1997] 3 CLJ 274; [1997] 2 MLJ 805, a decision of the Supreme Court.

[82] The Sabah Land Rules (G.N. 505 of 1930) have a whole portion devoted to "sale of land by chargee" from rr. 14(1) to (20). These sub-rules are designed to give the borrowers or chargors the mantle of protection of the law. There is the notice requirement under Schedule H with respect to "notice by chargee in case of default."

[83] After the expiry of the notice by the chargee, the chargee would then proceed under r. 14(2) by way of an "application by chargee for sale of land" by way of the Form in Schedule I.

[84] The Collector would then subsequently, pursuant to r. 14(2), give the chargor a "notice by Collector that chargee has applied for order for sale of land" in Schedule J to show cause why the application should not be granted.

[85] At the hearing, the Collector under r. 14(9) is to determine by order in the form of Schedule K the amount due under the charge and order the sale of the land charged. The sale shall be by way of a public auction and the auctioneer shall be nominated by the collector under r. 14(10).

[86] The Collectors shall also under r. 14(11) determine the conditions of sale and he shall also put a reserve price on the land and cause such public notice to be given of the sale as he may in the interest of the parties or of either of them think advisable, and may postpone the sale if he thinks fit.

[87] There also other safeguards are provided as in r. 14(12) to (14) with respect to the chargor's rights as follows:

> (12) At any time prior to the fall of the hammer the owner of the land shall have the right to stop the sale upon payment of the sum due together with all costs.
>
> (13) The chargee may himself bid at the sale.
>
> (14) No officer employed in the Land Office of the district and no officer having any duty to perform in connection with any sale under the Ordinance shall either directly or indirectly bid for, acquire, or attempt to acquire any interest in property offered at such sale.

[88] See also a consideration of the safeguards in the case of a security taken by way of a charge under the NLC in the Court of Appeal case of *Global Globe Property (Melawati) Sdn Bhd v. Jangka Prestasi Sdn Bhd* [2020] 6 CLJ 1; [2020] MLJU 424 paras. [151] to [153].

[89] Whilst there is no express prohibition against taking custody of the title to the property and having a sale and purchase agreement drawn up and the memorandum of transfer as security for a loan, all to be effected upon default, yet if such a practice is permitted, it would defeat the purpose of the law. The safeguards afforded to borrower, with many not having the power to negotiate the terms of the loan when in dire need of money, would be illusory when such a borrower has to sign the transfer of his land over to the lender in escrow.

[90] It is another mirage for the lender to say that he is not charging interest upon default when the land taken as security would normally be of higher market value than the amount of the loan. This was precisely what Shim was trying to impress the High Court below in that he did not charge interest at all even after default after 31 December 2016 and that it was Harun who actually volunteered to pay the interest on the friendly loan. However, no valuation report was produced to assuage any concerns of the borrowers that the market value of the four pieces of land is not in excess of the amount borrowed.

[91] There was also evidence before the High Court that Shim could charge Harun's land to Public Bank for RM2.8 million and Shim's explanation was that he had spent money to grow the oil palm which is ready for harvesting and also because of his creditworthiness. That is precisely the problem when an outright transfer for the amount of the loan is taken. There was no notice of assessment of stamp duty produced by Shim for the transfer of the properties, which if produced would indicate the stamp duty office's valuation of the properties.

[92] In the unlikely event that the market value is less than the amount of loan taken, the lender could still claim the shortfall, *albeit* by suing the borrower. However, when the market value is more, there is no refund of the amount in excess to the borrower after applying the auction price paid towards settlement of the loan sum. Rule 14(17) of the Sabah Land Rules provides as follows:

> (17) The purchase money arising from any such sale shall be applied firstly in the payment of any rent and fees due to the Government; secondly in payment of the expenses and costs of, and incidental to, the notices, summonses and sale; thirdly in payment of the moneys which may then be due or owing to the chargee; fourthly in payment of subsequent charges if any in the order of their priority, **and the surplus if any shall be paid to the chargor** or other person entitled thereto. (emphasis added)

[93] The consideration for such a contract is unlawful as a charge should have been created over the lands in question and not the sale and purchase agreements and memoranda of transfer and so these agreements and instruments of transfer are thus void under s. 24(b) of the Contracts Act 1950 [Act 136], in that, if permitted, would defeat the purpose of the SLO as follows:

> **What considerations and objects are lawful, and what not**
>
> 24. The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by a law;
>
> **(b) it is of such a nature that, if permitted, it would defeat any law;**
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void. (emphasis added)

[94] We were given to understand that such a practice is very prevalent and that the court should respect the freedom of the parties to contract. We must state emphatically that no matter how prevalent a practice is, it cannot be lawful if the consideration if permitted would defeat the purpose of the law designed to protect the weaker and more vulnerable party.

[95] In *Global Globe Property (Melawati) Sdn Bhd v. Jangka Prestasi Sdn Bhd Bhd* (*supra*), the Court of Appeal observed as follows:

> [152] The device of using a sale and purchase agreement as a security for a loan is clearly to circumvent the protective provisions of the Moneylenders Act 1951.
>
> Even if the plaintiff lender is not a moneylender at all it would be an aberration to allow such a person to charge interest of RM400,000.00 for a loan of 3 months when even a licensed moneylender would blush under it. **A person who is not a moneylender cannot under the guise of a friendly loan exact more onerous terms than what a licensed moneylender is permitted as that would turn the law upside down.**
>
> (emphasis added)

[96] In *Global Globe Property (Melawati) Sdn Bhd v. Jangka Prestasi Sdn Bhd Bhd* (*supra*), the Court of Appeal concluded as follows:

> [154] The transaction is illegal as it is forbidden by the Moneylenders Act 1951 and further if allowed, would defeat the purpose of the law. It would also be against public policy.

[97] As for freedom of contract, we must say it needs to be circumscribed by the paternal protection of the law especially when there is a clear inequality of bargaining powers. One can imagine the abuse that would come in its wake if such a practice is approved by the court. Licensed moneylenders and bankers would happily jump into the bandwagon and in future take a transfer in escrow and immediately transfer the landed properties upon default and make a huge profit from a so-called more efficient transaction where there is no need to go before the collector.

[98] A borrower in dire financial straits has little freedom of contract for otherwise they would probably have gone to the banks to borrow. Freedom of contract implies some choice or room for bargaining which the borrowers here did not have. See: the House of Lords case of *Suisse Atlantique Société D'armement Maritime SA v. NV Rotterdamsche Kolen Centrale* [1966] 2 All ER 61 and our Federal Court case of *CIMB Bank Bhd v. Anthony Lawrence Bourke & Anor* [2019] 2 CLJ 1; [2019] 2 MLJ 1.

[99] It was Denning LJ in *John Lee & Son (Grantham) Ltd and Others v. Railway Executive* [1949] 2 All ER 581 who captured the reality of unbridled freedom of contract as:

> Above all, there is the vigilance of the common law while allowing for freedom of contract, watches to see that it is not abused.

[100] Regulation 10(1) of the Moneylenders (Control and Licensing) Regulations 2003 ("the Regulations") provides that every agreement for moneylending transaction with security shall be in the form prescribed in Schedule K and makes it a criminal offence for non-compliance. Paragraph (4)(a) of Schedule K further provides that where the security is an immovable property, the property shall be dealt with as provided for under O. 83 of the Rules of the High Court 1980 which is now to be read as Rules of Court 2012 with respect to charge actions.

[101] Regulation 10(2) of the Regulations declares as void and of no effect and unenforceable any agreement for moneylending not in compliance with the prescribed form and in this case Schedule K and includes addition to the prescribed form. A sale and purchase agreement is not a proper moneylending agreement in compliance with Schedule K.

[102] A lender of a friendly loan cannot create for himself a form of security in an outright transfer of the land of the borrower put up as security when even licensed moneylenders and the banks cannot do that. It would be contrary to public policy to allow a mischief sought to be remedied by a statutory provision to be defeated on the basis of freedom of contract. See: para. [54] of the Federal Court case of *Cubic Electronics Sdn Bhd (In Liquidation) v. Mars Telecommunications Sdn Bhd* [2019] 2 CLJ 723; [2019] 6 MLJ 15.

Whether The Transfer Of Lands To The Lender And Duly Registered In His Name Is Liable To Be Set Aside

[103] The four pieces of land having been transferred under a void agreement and instrument are liable to be set aside. In the Federal Court case of *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd* [1996] 2 CLJ 561; [1996] 2 MLJ 12 at pp. 575 to 576 (CLJ); p. 24 (MLJ), Edgar Joseph Jr FCJ explained as follows when dealing with the SLO:

> The preliminary point we should like to deal with is: whether the system of land tenure in Sabah is based upon the Torrens registration system?
>
> *Nowhere in the Land Ordinance is there any provision conferring indefeasibility of title to or interests in land which is a feature of central importance to the Torrens system of land registration. This is to be contrasted with the position in Peninsular Malaysia and Sarawak, where there are express provisions conferring such indefeasibility.* (See ss. 92(1) and s. 340 of the National Land Code and s. 131 of the Sarawak Land Code (Cap 81) respectively.) Moreover, in Sabah, unlike Peninsular Malaysia and Sarawak, in appropriate circumstances the doctrine of adverse possession may be invoked against private owners of land. (See s. 6 of the Sabah Land Ordinance (Cap 68) which merely bars any claim to any right, title or interest in state land only based on adverse possession thereof).
>
> …
>
> Similarly, in the earlier case of *Lin Nyuk Chan v. Wong Sz Tsin* [1964] MLJ 200, the old Federal Court, which comprised Thomson LP, Wee Chong Jin CJ (Singapore) and Wylie CJ (Borneo), at a time when our apex court was still the Privy Council, expressed the view that *the Land Ordinance provides for a modified Torrens system of land registration* … (emphasis added)

[104] Section 88 of the SLO is often relied on to support the argument that upon registration the title of the registered proprietor is indefeasible. It reads:

> **No new title** and no dealing with, claim to or interest in any land except, land still held under native customary tenure without documentary title **shall be valid until it has been registered** in accordance with the provision of this Part. (emphasis added)

[105] The more recent Federal Court case of *Sia Hiong Tee & Ors v. Chong Su Kong & Ors* [2015] 8 CLJ 1173; [2015] 4 MLJ 188 has reiterated as follows:

> [29] *Section 88 of the SLO on the other hand does not incorporate the concept of indefeasibility of title as found in s. 340 of the NLC …*
>
> …
>
> [30] From the plain reading of s. 88 of the SLO, we find there exists a lacuna in this provision when compared with s. 340 of the NLC which embodies the concept of indefeasibility of title. *Registration under the SLO does not confer indefeasibility of title, deferred or immediate*. We are of the view

that in the absence of statutory intervention in the like of the proviso to s. 340(3), there is no protection afforded to the *bona fide* purchaser for value without notice such as the appellants in the present case. Therefore, with respect, we differ from the view expressed by Richard Malanjum J in *Ngui Yu Thau v. Wong Mu Khyun & Ors*, at p. 289 where he stated: 'Thus in Sabah with specific reference to land the principle as enunciated by the Federal Court in *Adorna Properties Sdn Bhd* applies notwithstanding the *lacuna* in the Ordinance. In other words no one derives good title, right or interest from or through a forged instrument unless he satisfied the doctrine of *bona fide* purchaser for value and without notice.'

[31] We are of the view that s. 88 of the SLO must be considered on its own without being unnecessarily influenced by the provisions of the NLC because they are poles apart. Section 88 of the SLO merely deals with the registration of new title, dealing with claim to or interest in any land, other than land held under native customary tenure without documentary title. It requires such title or dealing, *etc* to be registered for it to be valid under the SLO. In other words, it does not deal with the issue of defeasibility or indefeasibility of title as contained in s. 340 of the NLC.

[32] *The fact that the names of the appellants found their way on the register of title does not automatically confer on the appellants an indefeasible title*. In other words, it is open to enquiry as to how the appellants got themselves registered as owners of the land. That was precisely what the courts below did in the present case and came to the conclusion that the appellants could not get valid title to the land on the ground that the power of attorney which was used as authority to transfer the land was a forgery. In its judgment the Court of Appeal stated: '... in this case that the power of attorney that was used as authority to transfer the said land to the appellants is a forgery, we agree with the learned trial judge that the title of the appellants to the property is defeasible and that the appellants could not have acquired a valid title to the said land though the land has been registered in the name of the appellants.'

[33] We agree with the finding of the courts below that *the instrument of transfer in the present case was an invalid or void instrument of transfer* as it was executed on the authority of a forged power of attorney, therefore, *it could not give rise to a valid title in law and the SLO does not seek to give validity to such a title even* though the appellants were *bona fide* purchasers for value without notice. There is nothing in the SLO giving protection to such purchasers. Such statutory protection must be expressly provided in the SLO (*Gibbs v. Messer* [1891] AC 248).

(emphasis added)

[106] The transfer of the four titles to Shim and duly registered in his name is not indefeasible as the agreements and memoranda of transfers are void for the reasons given and thus, the registrations have to be set aside and the four pieces of land reverted to the original proprietors in Dayang and Harun.

[107] We therefore agree with the High Court though for a different reason.

The High Court had held that there was no express reference to a set-off in the options to purchase and the sale and purchase agreements with respect to a right of set-off in relation to the loans taken as reflected in the deeds of acknowledgment of indebtedness and undertaking to pay. There was however also no prohibition as to a set-off. We agree with learned counsel for Shim that when there is no prohibition on a set-off, the common law would apply.

[108] Learned counsel for Shim drew our attention to a decision of the Ontario Supreme Court case of *Citibank Canada v. Confederation Life Insurance Co* (1996) CanLII 8269 (on SC) that held as follows:

> [35] Set-off may arise contractually, or at law (including by statute), or in equity: see, generally, *Telford v. Holt* (1987), 41 DLR (4th) 385 (SCC).
>
> …
>
> [37] For set-off at law to occur, the following circumstances must arise:
>
> 1. The obligations existing between the two parties must be debts, and they must be debts which are for liquidated sums or money demands which can be ascertained with certainty; and,
>
> 2. Both debts must be mutual cross-obligations, *ie*, cross-claims between the same parties and in the same right.
>
> [38] Not surprisingly, **for set-off to occur in equity, the requirements are more relaxed. There is no necessity for mutuality.** The cross obligations need not be debts, but may be for a sum of money whether liquidated or unliquidated. However, the cross-claims for money must be connected or interrelated in some manner which would make it unjust to permit one party to enforce payment without accounting for the existence of the other claim. (emphasis added)

[109] We are of the considered view that it would be too much of a coincidence for the deeds of acknowledgment of indebtedness and undertaking to pay to be dated the same date as the option to purchase. The reasonable inference is that both Dayang and Harun were aware that should they default on the loans taken, the loan sums would be set-off as the agreed purchase price for the respective pieces of land.

[110] It would also be very odd that the price stated in the options to purchase and the sale and purchase agreements and the memoranda of transfer all reflect the same purchase prices as the loan sums acknowledged in the four different deeds of acknowledgment of debt and undertaking to pay unless, it is a case of an agreement to set-off these amounts of loans from the purchase price of the respective properties "secured" for the respective loan sums.

[111] Moreover, the relevant clause in the sale and purchase agreements for example cl. 2 of Harun's sale and purchase agreement expressly stated that the purchase price (which is the same amount as the loan sum) had been received as full payment, even prior to the agreement being dated though already signed in escrow at the time of signing the deeds of acknowledgment of debt and undertaking to pay.

[112] Shim had acted consistent with his understanding of the parties' agreement on this which is the reason why he did not have to sue them in court to recover the loan sums upon default. The fact that there was rental payments by Dayang to Shim after the transfer of Dayang's three properties to Shim would be a strong indication that Dayang knew of the transfer of her three properties to Shim. There were also WhatsApp messages from Shim to Dayang when there was default in rentals for Lot 188 and 189 in Astana Heights.

[113] When she defaulted in payment and when she and her son Harun sued to recover the properties, Shim then counterclaimed for vacant possession of the properties and for a declaration that he is the lawful owner of the four properties.

[114] Ordinarily, Shim would have been entitled to set-off the loans given against the purchase price of the four properties if not for the fact that this court has held that the sale and purchase agreements and the memoranda of transfer are void with the result that no set-off is possible.

Whether The Counterclaim For The Tort Of Injurious Falsehood And The Tort Of Abuse Of Process Could Be Sustained

[115] In light of the above reasons given, Shim's counterclaim for the tort of injurious falsehood and the tort of abuse of process said to have arisen as a result of Dayang and Harun making false statements, cannot be sustained.

[116] In a court of law, the court may believe certain averments of the parties and disbelieve certain averments for reasons given by the court. That cannot give rise to the tort of injurious falsehood nor the tort of abuse of process.

[117] Generally, statements made in judicial proceedings cannot be a matter of a separate tort of injurious falsehood or defamation. In deserving cases where much of the court's time has been dissipated listening to allegations that could not be substantiated or supported by facts, the court shall not hesitate to mulct a party with costs.

[118] In a case that justifies prosecution for perjury the court would direct the parties affected to make a police report or furnish a copy of the notes of proceedings to the Attorney General as the Public Prosecutor.

[119] Likewise, the action of Dayang and Harun could not be said to be an abuse of process for they managed to get back their four properties. Going by the standard asked of Shim for this court to uphold, Shim himself would be guilty of abuse of process in depriving the plaintiffs of their properties other than through the approved method of a charge being properly created for the loans taken. We need say nothing more.

Decision

[120] In the light of our above findings that the loans were friendly loans, having satisfied ourselves that Shim was not a moneylender within the meaning of the MA 1951, the proper order should be that this appeal is to be allowed in part and that each of the respondents, Dayang and Harun, shall each repay the appellant Shim the sum acknowledged to be owing to the appellant in the SAFs.

[121] For this purpose, we allowed judgment to be entered against Dayang for RM1,230,000 together with interest at 5% per annum from the date of our decision on 17 March 2023 to date of realisation and another judgment for RM1,152,240 against Harun with interest at 5% per annum from the same date to date of realisation.

[122] We struck down the default interest of 1.5% per month as it was Shim's stand that he did not charge this default interest even though it was provided for as suggested by Harun. He, of course, had not told us how the properties that he had transferred to himself were all so coincidentally equal to the amount of the loans given.

[123] Save for the above, the rest of the order of the High Court is affirmed and maintained.

[124] Each party shall bear their own costs here and costs in the High Court is affirmed.